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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-196

CHARLES W. LEE, JR., and RAY METCALF, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners Charles W. Lee, Jr. and Ray Metcalf hereby respectfully petition the Supreme Court of the United States to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 10, 1971 and the said Court's denial, on July 9, 1971, of petitioners' application for rehearing.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. Said opinion is included in the appendix to this petition. No opinion was rendered by the United States District Court for the Southern District of Indiana where petitioners were tried before District Judge S. Hugh Dillin and a jury.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Seventh Circuit sought to be reviewed was entered on June 10, 1971. A timely Petition for Rehearing En Banc was filed by petitioners, but denied by the Court of Appeals on July 9, 1971. This petition for writ of certiorari is thus filed within thirty days after the Court of Appeals' last mentioned action of July 9, 1971. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

This petition presents the following ten questions for review:

1. Whether petitioners were denied due process of law under the Fifth Amendment when they were convicted of violating the federal Travel Act (18 U.S.C. § 1952) without any showing (i) that petitioners themselves ever crossed any state line to promote, manage, establish, carry on or facilitate the operation of a small, local gambling enterprise in Evansville, Indiana (of which they were only two of four operators), or (ii) that petitioners *wilfully or knowingly* caused any other person to travel across any state line for such

purpose within the scope of the federal Aiding and Abetting statute (18 U.S.C. § 2)?

2. Whether petitioners were denied due process of law under the Fifth Amendment when they were convicted of violating the federal Travel Act (18 U.S.C. § 1952) on the basis of a trial record which demonstrated only that *two betting patrons* of the aforementioned gambling operation in Evansville (defendants Sights and West), one of whom was sometimes observed assisting players in the handling of dice at the dice table and the other who was sometimes observed taking players' paper slips to a cashier's cage, actually resided in Kentucky, directly across the river from Evansville and thus had to cross a state line to travel within the Evansville metropolitan area—*said record being totally devoid of any evidence whatsoever that petitioners, or either of them, had any knowledge whatsoever of such travel by either Sights or West or that either petitioner ever did anything knowingly or wilfully to aid, abet, counsel, command, induce or procure such travel by Sights or West?*

3. Whether petitioners were denied due process of law under the Fifth Amendment when the Court of Appeals ruled that "The jury could *reasonably infer* that appellants had *knowledge of their employees' interstate travel*", when the trial record is *barren* of any proof of any demonstrable or regular employer-employee or principal-agent relationship between petitioners and Sights or West?

4. Even assuming *arguendo* that some unproved, minimal *volunteer-type* "employment relationship" could be *"inferred"* as the District Court and the Court of Appeals found (See R. 401), were petitioners

denied due process under the Fifth Amendment in the sense of this Court's opinion in *Leary* v. *United States,* 395 U.S. 6 (1969) when they were convicted of criminally violating the Travel Act (18 U.S.C. § 1952) and sentenced to 15-year prison terms and heavy fines on the basis of a further ruling that such *inferred employment relationship* may then constitutionally be pyramided into a *second arbitrary inference* —to wit, that petitioners, as the *inferred employers,* may reasonably be *further "inferred"* to have *knowledge* of their *inferred employees'* interstate travel?

5. Whether in light of this Court's recent decision in *Rewis* v. *United States,* 91 S. Ct. 1056 (1971) and in light of the legislative history and purpose of the Travel Act (18 U.S.C. § 1952), petitioners' convictions in this case must be set aside because the record shows that Sights and West were betting customers of the Evansville gambling enterprise; there is no evidence they were regularly employed or compensated for assisting the gambling enterprise in the manner hereinabove described; and there is no showing that petitioners ever actively sought either the interstate patronage or assistance of Sights and West?

A subsidiary question, of course, is whether the Travel Act, which was enacted by Congress as a weapon against organized crime and nationwide criminal operations, may constitutionally be construed to apply to *local, commuter-type travel* of the kind here involved (particularly in this situation where petitioners did *no* traveling themselves, but have been convicted on the basis of a mere *presumption* or *inference* that they should have known of someone else's interstate travel within the confines of the local Evansville commuting area)?

6. Each of the three counts of the indictment against petitioners in this case charge (R. 38, 39):

> "That on or about July (August) —, 1969 in the Southern District of Indiana, Charles W. Lee, Jr. and Ray Metcalf unlawfully, *wilfully and knowingly did cause* Emory Sights and Raymond K. West *to travel in interstate commerce, from Henderson County, Kentucky to Evansville, Indiana. . . .*" (Italics supplied)

Accordingly, were petitioners constitutionally convicted of a violation of the Travel Act (18 U.S.C. § 1952) under such an indictment without any proof that they did in fact "*wilfully and knowingly*" cause such travel?

7. Was it reversible error for the District Court to refuse to instruct the Jury, as petitioners requested, that (R. 140)—

> "*Instruction No. 7*
>
> ". . . . if you find beyond a reasonable doubt that the Defendants, Emory Sights and Raymond K. West, traveled interstate to facilitate a gaming establishment, but *fail to find beyond a reasonable doubt* that the Defendants, Charles W. Lee, Jr. and Ray Metcalf, *had knowledge thereof,* then you should find the Defendants, Charles W. Lee, Jr. and Ray Metcalf, not guilty." (Italics supplied)

8. Was it reversible error and violative of petitioners' constitutional rights under the Fifth Amendment for the District Court thereupon *distortedly* and *erroneously* to instruct the Jury in the following manner *and to give the Jury a copy of such instruction to*

keep during all of its deliberations in the Jury Room (R. 150, 155):

> "*Instruction No. 10.* . . .
>
> "However, it is not necessary that any defendant had knowledge that travel in interstate commerce for the purpose of carrying on or facilitating a business enterprise involving gambling was a violation of Federal law. It is sufficient if such a defendant knew that to carry on or facilitate such a business enterprise in Indiana was in violation of Indiana law."

9. Was the pre-indictment search and seizure of petitioners' property violative of the Fourth Amendment? And, was evidence or testimony obtained as a result thereof constitutionally admissible at the trial?

10. Did the District Court violate petitioners' constitutional right to equal protection of the law and due process and did the District Court abuse its discretion under the facts here presented, when it meted out *maximum* 15-year prison sentences and $15,000. fines to each of the petitioners, under the federal Travel Act, while (i) it simultaneously granted *probation* and relatively minor fines to Sights and West who actually traveled across state lines and were thus the principal alleged violators of the Travel Act in this case; and (ii) when the penalties for violations of the Indiana gambling laws specified in the indictment range between only 10 days to 1 year imprisonment and fines of only $5.00 to $1,000?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourth and Fifth Amendments to the Constitution of the United States and the so-called federal Anti-Racketeering Travel Act (Title 18 U.S.C. § 1952) and the federal Aiding and Abetting Statute (Title 18 U.S.C. § 2). Pursuant to the provisions of Rule 23(d) of this Court's rules, the text of said provisions is set forth in the Appendix to this petition.

STATEMENT OF THE CASE

On August 21, 1969, petitioners and Emory Sights and Raymond K. West were indicted for alleged violations of the Travel Act (18 U.S.C. § 1952) and the Aiding and Abetting Statute (18 U.S.C. § 2) (R. 36-39). Sights and West were charged with three counts of actual travel between Henderson County, Kentucky and Evansville, Indiana to facilitate the operation of a dice game and a blackjack game in Evansville in violation of Indiana's gambling laws (R. 36, 37). Petitioners were separately charged in three additional counts of the indictment substantially as follows (R. 38, 39):[1]

> "That on or about July (August) —, 1969, in the Southern District of Indiana, Charles W. Lee, Jr. and Ray Metcalf unlawfully, *wilfully* and *knowingly did cause* Emory Sights and Raymond K. West *to travel in interstate commerce* from Henderson County, Kentucky to Evansville, Indiana with intent to . . . carry on and facilitate . . . an unlawful activity being a business enterprise involving gambling. . . ." (Italics supplied)

[1] Each of the three counts was identical, except the first count charged a violation on July 23, 1969; the second, a violation on July 30, 1969; and the third, a violation of August 9, 1969.

The record before the Court shows that petitioner Metcalf and his wife Helen are the owners of a two-story building located at Nos. 716-720 North Third Avenue in Evansville, Indiana (R. 175-177; 428). The premises at No. 716 were rented to a barber who operated a barber shop (R. 179). No. 718 was rented to operators of a tavern known as Ray's Tavern (R. 180, 181). No. 720 was rented to petitioners herein who operated a restaurant called the Pancake House on the ground floor (R. 183, 428). The upstairs portion of the building housed a small gambling enterprise which consisted of two dice games and a blackjack game (R. 187, 188). Petitioners also had a small office on the second floor, where they kept a desk, a filing cabinet and a safe (R. 188, 190, 191).

The blackjack game was operated by Louis H. Hollingsworth and Claude Simpkins (R. 235, 279, 291). Hollingsworth and Simpkins, who were *not* indicted by the Government, owned and kept two-thirds of the profits of that operation, while petitioners were entitled to one-third (R. 235, 279, 291). Petitioners, in turn, owned and operated the dice game (R. 232).

Emory Sights and Raymond K. West resided in Henderson County, Kentucky, directly across the Ohio River from Evansville (R. 393-395). The record shows that Sights and West liked to gamble and that they frequented petitioners' establishment *and other gambling places* in Indiana *as customers* for the purpose of "shooting dice" and playing cards (R. 285; 288; 273, 274; 297; 305; 327, 328). Several of the Government's witnesses at the trial testified that both Sights and West regularly shot dice and played blackjack *as customers* at petitioners' establishment, and one described Sights' activities there as "Visiting

around, playing around" (R. 285; 288; 273; 274; 297; 305; 327, 328).

The Government, which assigned 14 FBI agents to this local gambling case (R. 345), sought to determine whether Sights and West were ever employed by petitioners. A subpoena duces tecum was served on petitioners' accountant demanding the production of "all W-2 forms . . . for the employees" employed by petitioners and three other business enterprises listed in the subpoena (R. 443). Petitioners' accountant produced all such W-2 forms for the years 1963-1968, *but there were no such employment withholding tax forms for either Sights or West* (R. 446). The Government thereupon produced persons who were actually employed by petitioners as witnesses at the trial, and they testified that petitioners regularly furnished their gambling employees with the necessary federal withholding tax forms (R. 307, 309, 322), thus raising the inference that the absence of W-2 forms or other employment tax records for Sights and West meant that they were *not* employed by petitioners.[2]

The Government also subpoenaed all accounting and Federal and State tax records of petitioners themselves and those belonging to Sights, West and 20 other persons or corporations, but again apparently nothing was discovered by the Government which suggested the existence of an employer-employee relationship between petitioners and Sights or West because no such

[2] One Martin, who testified he only worked on weekends "when he'd work", received $10 a day in cash for those days and thus testified he did not receive a W-2 form (R. 271). But the record shows that petitioners regularly supplied W-2 forms to their other employees and same were made available to the Government in this case (R. 307; 322; 446).

tangible evidence is contained in the trial record (R. 443, 444).

The Government thus sought to establish through the trial testimony of petitioners' other employees that some sort of employment or agency relationship existed between petitioners and Sights and West. Betty Marshall, a waitress who served drinks to petitioners' gambling customers, was called (R. 302). She testified that she received tips for serving drinks and that she divided her tips with *all of the other employees* (R. 307, 308). Mrs. Marshall was thereupon asked if Sights or West ever shared in her tips, and she answered "*not that I know of*" (R. 308).

At the very best, therefore, the Government's entire case regarding petitioners' alleged employment relationships with Sights and West is based on vague, conflicting, contradictory testimony by the Government's witnesses regarding *the question of whether Sights and West spent all of their time gambling for themselves at petitioners' establishment or whether they were sometimes engaged in activities from which an inference might be drawn that they were performing duties for petitioners.* Customers called by the Government to testify stated that West was "not always there" (R. 253); that they didn't even remember West and Sights (R. 259); or that when they saw West at the dice table, they were not certain "whether he was playing or not" (R. 254). Other employees summoned by the Government testified that they always observed Sights and West "playing a lot—shooting dice", and playing cards along with the other customers (R. 273, 274, 285, 288, 297, 305, 327). When the Government asked Mr. Martin whether Mr. Sights was employed, Mr. Martin replied (R. 273): "I don't

know what Mr. Sights' job was, if he had a job, but he played a lot up there". The Government persisted and this testimony followed (R. 273):

> "Q. What do you mean, 'He played a lot'?
> A. He'd shoot dice.
> Q. For the house or for himself?
> A. No, for himself."

These same witnesses testified that on other occasions Mr. West was seen standing at the dice table (R. 251); or that he was observed using a stick to push the dice to other players (R. 263, 281, 288); and that Mr. Sights was seen sleeping in the cashier's cage or carrying slips of paper to the cashier's cage (R. 306; 327). The Government's witness (one of petitioners' employees) who gave the last mentioned testimony hastily added, however (R. 326):

> "Q. You don't know, of your own knowledge, whether Mr. Sights was employed up there or not, do you?
> A. I never seen him get paid, no."

FBI undercover agents called by the Government gave equally vague, contradictory and conflicting testimony. Agent King played dice at petitioners' establishment on two or three nights during August, 1969 (R. 358-371). He testified he thought he saw Sights in the cashier's cage one evening (R. 363), but on cross-examination, he corrected his testimony and agreed he did not see Sights in the cage (R. 368). Regarding West, he stated he thought he saw West at the dice table, but he failed ever to mention West in his report (R. 367). Agent Standifer testified that he spent several evenings gambling in petitioners' establishment, but he admitted that West and Sights were not always there when he visited (R. 375, 381). Stand-

ifer stated that he concluded Sights was "working" for petitioners solely because he saw Mr. Sights accept small pieces of paper from Mr. Lee on which Mr. Lee had written something (R. 387). Standifer, however, on cross-examination, agreed that he never made any reference to any of these activities in the written FBI report he filed at the time (R. 388).

Confronted with this exceedingly dubious record, District Judge Dill suggested that Sights and West might only have been "*volunteers*", but he nevertheless denied petitioners' motion for judgment of acquittal at the end of the Government's case (R. 401).

In addition to the foregoing, albeit the FBI had 14 agents assigned to this case, the record is *completely devoid* of any evidence or testimony of any kind to show that petitioners had any knowledge whatsoever—

(1) that Sights and West resided in Kentucky; or

(2) that they drove across the Ohio River from Kentucky to Evansville in order to reach petitioners' establishment.

There is no evidence of any kind to suggest that petitioners ever visited Sights or West in Kentucky; or that they communicated with Sights or West in Kentucky; or that they had any reason to know or surmise that Sights and West had residences in Kentucky; or that Sights and West had automobiles with Kentucky plates.[3]

[3] The FBI testimony before the District Court was that Sights and West always parked a half block to a block away from petitioners' establishment, and although the agents took pictures of Sights and West and their cars (R. 368-471), there was nothing to suggest that petitioners were ever in those cars or that they knew anything about the cars or their license plates.

In conclusion, therefore, even if the contradictory, conflicting testimony before the District Court could be considered strong enough to justify a *reasonable inference* or *presumption* of some kind of *employment or agency relationship* between petitioners and Sights and West, it is crystal clear that any such *employment inference* cannot then constitutionally be utilized in this case as the basis for a *further inference* that petitioners somehow must be presumed also to have had knowledge of the necessity for Sights' and West's interstate travel.

The Seventh Circuit Court of Appeals thus patently erred when it ruled: "The jury could reasonably infer that appellants had knowledge of their employees' interstate travel".

ARGUMENT

POINT I

In Light of This Court's Recent Decision in Rewis v. United States, 91 S. Ct. 1056, and in View of the Legislative History of the Travel Act, Petitioners' Convictions Should Be Set Aside.

In *Rewis* v. *United States*, 91 S. Ct. 1056 (1971), this Court unanimously ruled that, in light of the legislative history of the Travel Act (18 U.S.C. § 1952), interstate travel by *customers* of a gambling establishment and the conducting of a gambling operation frequented by out-of-state bettors do not violate the Act.

In *Rewis*, this Court also stated that in cases where *regular employees* or *duly constituted agents* of gambling operators cross state lines, both the employees and the operators are in violation of the Act,

and as authority for that holding the Court cited *United States* v. *Chambers,* 382 F. 2nd 910, 913-914 (CA 6, 1967); *United States* v. *Barrow,* 363 F. 2d 62, 64-65 (CA 3, 1966), cert. denied, 385 U.S. 1001; and *United States* v. *Zizzo,* 338 F. 2d 577, 580 (CA 7, 1964), cert. denied, 381 U.S. 915.

In the case at bar, the evidence is clear that Messrs. Sights and West were regular betting customers of petitioners' establishment and other gambling establishments in Indiana. They shot dice and played cards and gambled for their own account. There is no evidence of any demonstrable, clear-cut employment relationship between petitioners and Sights and West, such as those which existed in *Chambers, Barrow* and *Zizzo, supra.* In *Chambers,* for example, the employee involved was shown by compelling evidence to be in charge of the entire prostitution operation there involved. In *Zizzo,* the evidence established that Federal wagering returns and withholding tax returns were filed by the Indiana employer for each of the Illinois employees involved; hence, the evidence of the employment relationship and the employer's knowledge of his employee's out-of-state addresses was overwhelming. Finally, in *Barrow,* the employer was shown by the evidence to have personally employed each of his employees and to have been fully familiar with their out-of-state connections (See 229 F. Supp. 726).

In the instant case, confronted with the evidence that Sights and West were regular gambling customers in Indiana and faced with a complete absence of any tangible evidence of any employer-employee relationship, the District Court suggested at the end of the Government's case that perhaps Sights and West should be classified as mere *"volunteers"* to the extent

they were noticed, from time to time, seemingly helping out around petitioners' establishment.

In this case, however, the record shows that petitioners were only two of the four proprietors of the Indiana gambling operation here involved. Messrs. Hollingsworth and Simpkins operated the entire blackjack game and kept 2/3 of the profits therefrom. It is entirely possible (and not refuted by the evidence) that if Sights and West were occasionally allowed to help, the responsibility for that may rest with someone other than petitioners. Indeed, the record shows that when Simpkins suffered a heart attack, he caused a friend of his to handle the entire blackjack game without any compensation, simply to fill the gap (R. 301). In small, local operations of the kind here involved, such procedures regularly happen and are certainly understandable.

Obviously, therefore, this case lies in a vacuum or gray area—somewhere between the clear-cut "customer" situation involved in *Rewis* and the clear-cut "employee" situations presented by *Chambers, Barrow* and *Zizzo, supra.*

Thus, an important question of federal law which has not been, but should be settled by this Court, is here for review. *There is no evidence that petitioners at any time crossed state lines in connection with the operation of their dice game. There is no evidence that petitioners had any knowledge, or that they had any reason to have any knowledge, of any interstate travel by Sights and West. Yet, petitioners stand convicted under the Travel Act—first, on the basis of the flimsiest possible "inference" of an employment relationship with Sights and West and secondly, on the basis of a further inference predicated on the first*

inference mentioned above, that is, by reason of such inferred employment relationship, petitioners are presumed also to have possessed knowledge of Sights' and West's interstate travel and to have aided and abetted such travel in violation of 18 U.S.C. § 2.

The question, therefore, is whether severe criminal convictions of this nature can be constitutionally sustained on the basis of such a record and by dint of *double or pyramided inferences only.*

It is thus imperative for this Court to settle what type of demonstrable employment or agency relationship must be *proved* to exist *before* that relationship can be *constitutionally* utilized by the Government as a basis for an *inference* of knowledge by an alleged employer of the employee's interstate travel.

The Travel Act was aimed at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another (*Rewis* v. *United States, supra,* at page 1059). It was not aimed at producing totally unfair situations in which the geographic origin of customers (*or, as here, customer-volunteers*) could transform relatively minor state offenses into federal felonies (*Rewis* v. *United States,* at page 1059). *Ergo,* for the reasons hereinabove set forth, petitioners' convictions should be reversed and set aside.

POINT II

Petitioners Were Denied Due Process under the Fifth Amendment in the Sense of This Court's Opinion in Leary v. United States, 395 U.S. 6, When They Were Convicted of Criminally Violating the Travel Act Solely on the Basis of Two Pyramided, Irrational, Arbitrary Inferences or Presumptions.

In *Leary* v. *United States,* 395 U.S. 6, 36, 89 S. Ct. 1532 (1969), this Court ruled that a *criminal presumption* or *inference* must be regarded as "irrational" or "arbitrary" and hence *unconstitutional,* unless it can at least be said with substantial assurance that the *presumed fact is more likely than not to flow from the proved fact on which it is made to depend.* In *Leary,* this Court applied that rule to declare unconstitutional a *presumption of knowledge* of illegal importation of narcotics based merely on a defendant's *proved* possession of narcotics.[4]

In *Leary,* of course, the Government at least *proved* beyond any doubt that the defendant had *possession* of the narcotics in question. The only inference involved was a *presumption of knowledge* based on that *proved possession.*

In the case at bar, the Government *failed to prove any clear-cut, demonstrable employment relationship between petitioners and Sights and West,* but the District Court and the Court of Appeals ruled that the jury could *infer* or *presume* from the aforementioned *circumstantial testimony* that such a relationship might have existed. Considering the overwhelming evidence that Sights and West were really *only customers* of

[4] The test established by *Leary* has been followed by this Court in other recent important decisions (*Turner* v. *United States,* 396 U.S. 398, 90 S. Ct. 642 (1970)).

petitioners' establishment, that *basic inference or presumption* was itself, at best, "irrational" and "arbitrary".

But, the lower courts did not stop there. They ruled that *having indulged in the first inference regarding that employment relationship, the jury could then pyramid a second inference or presumption of knowledge of illegal interstate travel under the Travel Act on top of that first presumption.* This, we submit, was plainly arbitrary and unconstitutional. There was no evidence whatsoever that petitioners had to obtain employees from Kentucky or that gambling personnel were not readily available in Indiana.

In a criminal proceeding of this nature, Due Process of Law is a mockery if severe penalties involving long prison terms and heavy fines are to be predicated exclusively *on two successive arbitrary inferences standing alone.* As Mr. Justice Black stated in his concurring opinion in *Leary,* at page 55:

> "It is clear beyond doubt that the fact of possession alone is not enough to support an inference that the possessor knew it had been imported. Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference than it has power to tell juries they can convict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn."

Please see also: *United States* v. *Barnes,* C.C.A. 6, 1967, 383 F. 2d 287, 291; *Twitchell* v. *United States,* C.C.A. 9, 1963, 313 F. 2d 425.

In *Rewis* v. *United States, supra,* this Court stated that "Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state

metropolitan areas, substantial amounts of criminal activity, traditionally subject to State regulation, are patronized by out-of-state customers". Evansville, Indiana is one of those multi-state metropolitan areas. Again, in the spirit of *Rewis,* that *"happenstance"* has been unfairly employed by the Government to "transform relatively minor state offenses into federal felonies".

POINT III

The Court of Appeals Decision That Petitioners' Knowledge of the Unlawful Interstate Travel Could Be Based on Mere Suspicions or Surmise Is In Conflict with Decisions of Other Courts of Appeal, and It Should Be Reversed.

The indictment in this case charged petitioners with *"wilfully and knowingly" causing Sights and West "to travel in interstate commerce"* to facilitate an unlawful gambling activity in Indiana, in violation of the Travel Act and the Aiding and Abetting statute (R. 38, 39).

The record is barren of any proof of any kind that petitioners had any *knowledge* whatsoever of Sights' and West's interstate travel. The Seventh Circuit Court of Appeals ruled, however, that *knowledge of such travel* could simply be *"inferred"* from other facts of which petitioners herein likewise had *no knowledge.* In this regard, the Court of Appeals pointed to the fact that (1) Sights and West resided in Kentucky and (2) they regularly commuted in cars displaying Kentucky license plates. *But, there is no evidence anywhere in the record to show that either petitioner herein had any knowledge of either of those facts.*

Indeed, whereas 14 FBI agents were assigned to this case and while they constantly kept Sights and West under surveillance and took numerous photographs of

Sights and West and their automobiles, they produced no evidence to suggest that petitioners ever saw those cars or that petitioners had any contact with or knowledge of the residences in Kentucky. The record shows that Sights and West always parked their cars considerable distances away from petitioners' establishment, and again, the Government never sought to prove that petitioners had any knowledge of the Kentucky plates (R. 328-337).

In *United States* v. *Barnes*, C.C.A. 6, 1967, 383 F. 2d 287, 291, the Sixth Circuit Court of Appeals held that *inferences of knowledge* based on "*mere suspicion*" or *surmise* or on some theory that petitioners "could have been expected to know" of illegal interstate activity in violation of the Travel Act "will not suffice". The same rule was applied by the Ninth Circuit in *Twitchell* v. *United States*, C.C.A. 9, 1963, 313 F. 2d 425 to strike down a conviction under the Mann Act and the federal Aiding and Abetting statute.

The Court of Appeals decision in this case is thus clearly in conflict with those of other Courts of Appeal and the difference must be settled by this Court. *Moreover, the record here shows that petitioners have been convicted of a crime under the Travel Act without any proof of any knowledge whatsoever on their part of the interstate travel involved, whereas the indictment against them specifically made such knowledge and wilfullness an essential part of the charged offense.*

And, of course, the unconstitutional prejudice to petitioners was magnified by the District Court's *adamant refusal* to charge the jury, as requested by petitioners, that petitioners' *knowledge* of Sights' and West's interstate travel was an essential element of

the charged offense (R. 140); and by the District Court's subsequent insistence on distortedly and erroneously charging the jury as follows (R. 150, 155):

> "*Instruction No. 10*
>
> "However, it is not necessary that any defendant had knowledge that travel in interstate commerce for the purpose of carrying on or facilitating a business enterprise involving gambling was a violation of Federal law. It is sufficient if such a defendant knew that to carry on or facilitate such a business enterprise in Indiana was in violation of Indiana law."

POINT IV

The Travel Act Is Not Properly Applicable to the Insignificant, Localized Use of Interstate Commerce Here Involved.

The Travel Act was aimed at organized crime and more specifically, at persons who reside in one State while operating or managing illegal activities located in another—*immune from local officials.*[5] It was directed at "the top men of organized crime", not at local, insignificant operations such as those here involved.[6]

The Travel Act, if held to be applicable to this case, alters sensitive federal-state relationships; threatens to overextend limited federal police resources; and produces situations where mere happenstance transforms a relatively minor Indiana gambling offense into a federal felony (See *Rewis* v. *United States,* 91 S. Ct. 1056, 1059).

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[5] See Senate Report No. 644, 87th Cong., 1st Session dated July 27, 1961, referred to in *Rewis* v. *United States,* 91 S. Ct. 1056, 1059.

[6] See *Rewis* v. *United States,* 91 S. Ct. 1056, 1059, footnote 6.

Here, for example, the Act has operated to deprive petitioners of due process of law and equal protection of the law in the following manner:

Under the Indiana statutes set forth in the indictment against petitioners (Burns' Indiana Annotated Statutes, Sections 10-2307, 10-2311 and 20-2331, 1956 Replacement) the penalties for "Gaming", "Common Gambler" and "Professional Gambling" range from minimum fines of $5.00 and 10 days in jail to maximums of $1,000, and one year in jail. Petitioners, who the record shows were only local Evansville gamblers operating two dice tables and who were charged in the indictment with operating in violation of those Indiana laws, have now been sentenced to federal prison terms totaling 15 years apiece and $15,000. fines simply because of the "happenstance" of Sights' and West's interstate travel, of which they had no knowledge. Sights and West, however, the persons actually charged with the illegal interstate travel and with identical violations of the Indiana statutes mentioned above, received relatively minor fines and the District Court granted them *probation*. Moreover, the record shows that other local gamblers arrested with petitioners for violating the same Indiana statutes, *including petitioners' partners in the aforementioned black jack operation*, were promptly released from custody and all charges against them, both federal and state, were dropped (R. 254, 259, 287).

Federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes (See Mr. Justice Harlan's opinion in *Ingram* v. *United States*, 360 U.S. 672, 683, 79 S. Ct. 1314 (1959); *Twitchell* v. *United States, supra*, at page 428).

Federal assistance to local law enforcement under the Travel Act is entirely appropriate where, for ex-

ample, a gambling operation is conducted on an interstate carrier (*United States* v. *Brennan*, 394 F. 2d 151 (2d Cir., 1968), *cert. denied* 393 U.S. 839, or by regularly traveling across a state line to obtain essential supplies (*United States* v. *Puntillo*, 440 F. 2d 540 (7th Cir., 3/19/71); by the use of interstate credit cards and mailing lists to attract out-of-state participation (*United States* v. *Rizzo*, 418 F. 2d 71 (7th Cir., 1969); and where a Western Union ticker tape recording gambling information received from out of state is a regular and continuous element of the illegal enterprise (*United States* v. *Miller*, 379 F. 2d 483 (7th Cir., 1967).

But, there is nothing whatsoever about petitioners' enterprise in the case at bar, as disclosed by the evidence, which suggests any reason why state police powers need to be supplemented by the federal government (*United States* v. *Altobella*, 442 F. 2d 310 (7th Cir., 4/8/71); *Rewis* v. *United States*, *supra*; *United States* v. *Hawthorne*, 356 F. 2d 741 (CCA 6, 1966). *Ergo*, the Travel Act, by reason of its own legislative purpose and intent, is not applicable to the case at bar.

POINT V –

The Pre-Indictment Search and Seizure of Petitioners' Property Was Violative of the Fourth Amendment and All Evidence and Testimony Derived Therefrom Was Inadmissible.

Petitioners have contended from the very outset of these proceedings that the search warrant served upon them prior to the indictment and at the time of the early morning raid of their premises was void because it did not particularly describe the place to be searched as required by the Fourth Amendment. The warrant described the premises as "Ray's Lounge, which is a two story red brick building located at 718-720 North

Third Avenue. . . ." (R. 33). The evidence showed that the building at that location was a multiple occupancy building with a barber shop, tavern and restaurant on the first floor (R. 179-181); that each business had a different owner or operator; that the tavern had been known as "Ray's Tavern" (R. 227); and that on the second floor above the restaurant, known as the "Pancake House" (R. 181), was the room where the property was seized.

Petitioners thus submit that the warrant in this case which described the entire multiple-occupancy building for search when cause was shown only for searching the gambling room on the second floor, and the search itself which proceeded through the restaurant, not the tavern, and into petitioners' private office was void (*United States* v. *Hinton*, C.C.A. 7, 1955, 219 F. 2d 324, 326; *United States* v. *Barkouskas*, 38 F. 2d 837).

Moreover, during the search the Government removed desk drawers, a filing cabinet and a safe from petitioners' office and thereafter opened same and searched the contents. None of these properties located in petitioners' office were described in the search warrant or in the affidavit filed in support thereof (R. 29-34; 221). That belated search was not incidental to the arrest of petitioners and should not have been attempted without application for another warrant. It too was thus void (*Brett* v. *United States*, C.C.A. 5, 1969, 412 F. 2d 401; *Williams* v. *United States*, C.C.A. 5, 1969, 412 F. 2d 729).

Finally, witnesses whose identity was learned as a result of the unconstitutional searches were produced as witnesses against petitioners at the trial (R. 248-268). The "*fruit of the poisonous tree*" doctrine thus

made their testimony inadmissible at the trial (*Wong Sun* v. *United States*, 371 U.S. 471, 487-488, 83 S. Ct. 407).

Thus, this case presents important federal questions which should be reviewed and settled under the Fourth Amendment also.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted:

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Certificate of Service

This is to certify that service of three (3) copies each of the Petition for Certiorari hereinabove set forth were served by mail this 9th day of August, 1971, upon the Solicitor General, Department of Justice, Washington, D.C. 20530 and upon the Honorable Stanley Miller, United States Attorney for the Southern District of Indiana, United States Court House, Indianapolis, Indiana, the last mentioned service having been by Air Mail, and both mailings were with postage prepaid.

Attorney for Petitioners

APPENDIX

Pursuant to the provisions of Rule 23(d) of the Supreme Court Rules, petitioner sets forth hereinbelow the Constitutional provisions and statutes involved herein:

I. Applicable Constitutional Provisions and Statutes:

(1) The Fourth Amendment to the Constitution of the United States which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) The Fifth Amendment to the Constitution of the United States which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(3) The Travel Act (18 U.S.C. § 1952) which states:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

(4) The Aiding and Abetting Statute (18 U.S.C. § 2) which provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

II. Opinion of the Court of Appeals Sought To Be Reviewed:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970—APRIL SESSION, 1971

No. 18514

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

CHARLES W. LEE, JR. and RAY METCALF,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

June 10, 1971

Before DUFFY, *Senior Circuit Judge,* STEVENS, *Circuit Judge,* and CAMPBELL, *Senior District Judge.**

STEVENS, *Circuit Judge.* Two proprietors and two employees of a gambling enterprise in Evansville, Indiana, were convicted of violating the Travel Act.[1] The two entrepeneurs appealed, contending (1) that evidence was seized pursuant to a void search warrant, and (2) that the trial court erroneously failed to instruct the jury that knowledge of their employees' interstate travel was an essential element of the crime.[2] We reject both contentions.

---

* Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

[1] 18 U.S.C. § 1952. The counts naming apellants also alleged violations of 18 U.S.C. § 2, the aiding and abetting statute.

[2] Appellants also challenged the constitutionality of the statute and the sufficiency of the evidence. We find no merit in either of those contentions.

I.

The challenged warrant authorized a search of "the premises known as Ray's Lounge, which is a two-story red brick building located at 718-720 North Third Avenue. . . ." Probable cause for searching the premises thus described was established by the affidavit presented to the Commissioner. Appellants contend, however, that the evidence presented in support of their motion to suppress proved that the description was too broad because the location was in fact a multiple occupancy building.[3]

The building in question was owned by appellant Metcalf and his wife; it had three front entrances on North Third Avenue. The three entrances were separately numbered as 16, 18 and 20. A tenant operated a barbershop in No. 16, whereas Nos. 18 and 20 were under the control of defendants. The second story was only one-third the area of the first; it was located over No. 20 and housed the gambling operation.

During July, 1969, when F.B.I. agents surveilled and patronized the game, a tavern known as "Ray's Lounge" was operated in No. 18, and the first floor of No. 20 was being remodeled as an all-night pancake house. At that time access to the second floor was gained by entering the tavern, proceeding to the rear, and then climbing stairs at the back of No. 20. A few days before the raid the pancake house opened, the door at the rear of No. 18 was locked, and apparently access thereafter was obtained directly through the first floor of No. 20. The apparent

[3] As a related argument they also contend that the agents improperly seized a safe and filing cabinet, items not specifically identified in the warrant. However, neither of these items, nor any of their contents, nor any evidence derived as a result of their seizure, was received at the trial. The evidence of guilt included the gambling paraphernalia which was properly described in the warrant and the oral testimony of agents who had patronized the games on repeated occasions.

purpose of the change was to enable the tavern to comply with a 2:00 A.M. closing requirement without obstructing access to the principal business conducted on the premises.

Although appellants are correct insofar as they refer to the entire structure as a multiple occupancy building, the assertion is incorrect as applied to the premises described in the warrant, which was specifically limited to Nos. 18 and 20. The record indicates a single occupancy of the place to be searched and particularly described in the warrant.[4] Appellants' reliance on *United States* v. *Hinton*, 219 F.2d 324 (7th Cir. 1955) is therefore misplaced.[5] The fact that defendants conducted more than one business activity on the premises, particularly since the businesses were interrelated, does not invalidate the warrant or the search. *Cf., Steele* v. *United States*, 267 U.S. 498.

II.

The evidence showed that appellants' two co-defendants had been employed in the Evansville gambling operation for several years, that they resided in Kentucky, and that they regularly commuted to work in a car displaying Kentucky license plates. The jury could reasonably infer that appellants had knowledge of their employees' interstate travel.

Appellants argue, however, that the instructions did not require the jury to find such knowledge in order to

---

[4] [N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

[5] In that case the court held that evidence which failed to establish probable cause for the search of each residence in a multi-dwelling apartment building was not sufficient to warrant a search of the entire building. *Accord United States* v. *Higgins*, 428 F.2d 232, 234-35 (7th Cir. 1970).

return a guilty verdict. We disagree with this interpretation of the instructions. They clearly required the jury to find that appellants had knowledge of their co-defendants' interstate travel.[6] They did not require a finding of knowledge that the activity violated federal law, but such a finding is not an essential element of the crime. *United States* v. *Miller*, 379 F.2d [illegible]3, 486-88 (7th Cir. 1967) *cert. denied* 389 U.S. 930; see *United States* v. *Roselli*, 432 F. 2d 879, 890-93 (9th Cir. 1970) *cert. denied* 39 L.W. 3361 (discussing *Twitchell* v. *United States*, 313 F.2d 425 (9th Cir. 1963) on which appellants rely here).

[6] Instruction No. 9 read as follows:

"The essential elements of the offenses charged in each Counts IV, V and VI of the indictment, each of which must be proved by the Government beyond a reasonable doubt as to a particular defendant named therein with regard to a particular count before you would be justified in finding such a defendant guilty as to such a count, are as follows:

"1. That a defendant named in such counts, on or about the date mentioned, unlawfully, willfully and knowingly caused either Emory Sights or Raymond K. West, or both of them, to travel from Henderson County, Kentucky to Evansville, Indiana, in the Southern District of Indiana, with intent to carry on, or to facilitate the promotion, management or carrying on of a business enterprise involving gambling in the manner set out in the indictment.

"2. That such business enterprise, if any, was contrary to the laws of the state of Indiana.

"3. That after such interstate travel, if any, either Emory Sights or Raymond K. West, or both of them, unlawfully, willfully and knowingly did or attempted to do an act or acts facilitating the carrying on of such business enterprise, if any.

"The defendants Charles W. Lee, Jr., and Ray Metcalf deny each of said elements as to each of said counts."

III.

Neither the Supreme Court's recent decision in *Rewis* v. *United States*, 39 L.W. 4363, nor our decision in *Altobella* v. *United States*, Nos. 18254 and 18255 (7th Cir. Apr. 8, 1971), raises any question about the validity of these convictions.

In *Rewis* the Court held that actual or foreseeable interstate travel by patrons of the gambling operation was not a sufficient basis for applying § 1952 to the illegal activity. There is, however, a clear distinction between travel by customers and travel by employees of an illegal business.[7] Whether that travel is merely commuting across a state line on a daily basis or involves a transcontinental journey to perform a specific illegal mission is, in our judgment, immaterial.

We also consider *Altobella* plainly distinguishable. This record discloses continual interstate travel by employees of the illegal venture as well as substantial regular illegal activity "thereafter," factors not present in *Altobella*. Moreover, the isolated use of an instrumentality of interstate commerce in *Altobella* was caused by the victim, not by a member, of the unlawful enterprise. *Cf., Rewis supra.*

The judgment is affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

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[7] "Legislative history of the Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." 39 L.W. at p. 4364. Although the quoted sentence specifically mentions only persons at the executive level of the illegal enterprise, we believe the scope of the legislative purpose reasonably encompasses employees with limited responsibilities as well.

III. Orders of the Court of Appeals Denying Petition For Rehearing and Staying Issuance of Mandate:

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Friday, July 9, 1971

Before

Hon. F. Ryan Duffy, Sr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. William J. Campbell, Sr., District Judge

No. 18514

United States of America, *Plaintiff-Appellee*,

v.

Charles W. Lee, Jr. and Ray Metcalf,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Tuesday, July 20, 1971.

Before

Hon. JOHN PAUL STEVENS, Circuit Judge

No. 18514

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

CHARLES W. LEE, JR. and RAY METCALF,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

On consideration of the motion of counsel for defendants-appellants,

IT IS ORDERED that the issuance of the mandate of this Court be stayed for a period of thirty (30) days from this date in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

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No. 71-196

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

CHARLES W. LEE, JR. and RAY METCALF,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-190

CHARLES W. LEE, JR. and RAY METCALF,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On February 5, 1970, after a jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted of causing travel in interstate commerce to facilitate a gambling enterprise, in violation of 18 U.S.C. 1952.[1] Each

[1] Two co-defendants, Sights and West, who were charged with actual travel on specific dates from Henderson County, Kentucky to Evansville, Indiana, where they were employed in petitioners' gambling enterprise, were also convicted.

was sentenced to concurrent five-year prison terms on each count and fined a total of $15,000. The court of appeals affirmed (Pet. App. 3a-7a).

The evidence which is set forth in some detail in the opinion below showed that on August 9, 1969, petitioners operated an illegal gambling enterprise in Evansville, Indiana. The enterprise was located in a two-story building which petitioner Metcalf and his wife had owned for fifteen years. The first floor of the building contained a barber shop, Ray's Tavern, which petitioner Metcalf leased to his brother, Louis, and an all night restaurant, The Pancake House, which was operated by the L & M Co. (Lee and Metcalf) and managed by Robert Kasey who had formerly leased Ray's Tavern and held the tavern liquor license in his name (1 V 8-18).[2] The gambling enterprise was located in a second story room above the restaurant. On the above date, federal agents acting pursuant to a search warrant, gained access to the building through the restaurant and proceeded to the gambling room, where they seized extensive gambling paraphernalia and arrested some thirty-eight individuals.[3]

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[2] 1 V refers to the one volume transcript of the proceedings held on motions to suppress evidence seized in the raid. The testimony at trial is contained in a second volume, 2 V.

[3] Among the items seized in the main room of the gambling establishment were two dice tables, a blackjack table, chips, playing cards, croupier sticks and $14,200.71, mainly in cash. A locked second floor office used by the enterprise was also searched by the agents, and $23,000 in cash was found in a safe. A file cabinet was found to contain documents per-

Prior to the raid agents had conducted extensive surveillance of the gambling room and of two suspected employees of the enterprise, co-defendants Sights and West, both of whom were Kentucky citizens.[4] In late July 1969 an undercover agent (Standifer) entered the building in which Ray's Tavern was located, and, after some discussion with a guard, was admitted to the second floor gambling room (2 V 327). Agent Standifer then introduced a second undercover agent (King), and both men made numerous visits to the room before the raid on August 9, 1969. Both agents testified at length as to their observations of the operation and the various individuals involved. Their testimony confirmed the now-conceded fact that petitioners were the proprietors of the operation. Their observations during this period fully supported the view that Sights, who was regularly observed working in the cashier's cage, and West, who was regularly observed working at the dice tables as a croupier or "stick-man", were employees of the enterprise (2 V 132, 152, 167, 179-180, 192-193, 206-207, 221, 248-249, 256-257, 302-316, 326-344).

The testimony of the agents was further supported by the testimony of patrons and admitted employees of the enterprise called by the government. One wit-

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taining to the L & M Co. None of the evidence seized from the office which Metcalf had unlocked at the agents' request was introduced in evidence (1 V 66-99, 2 V 301A).

[4] The proof showed that West had resided in Kentucky for at least seven or eight years and that Sights had resided there for at least ten years (2 V 362, 364).

ness, a patron, testified that she had been going to the room to gamble for two years and had seen West working behind the dice table (2 V 132-133). Another witness testified that he had been going there since 1962 and had observed both co-defendants there regularly (2 V 210). Two dealers at the black-jack table, Hollingsworth and Simpkins, testified that they received a two-thirds percentage of the profits from the table while petitioners took the remaining one-third. A hostess, apparently carried as an employee of Ray's Tavern but who worked upstairs, and a dice-man employed by L & M Co. testified that they were paid by check on a weekly basis, by one or the other of the petitioners, and that they received W2 tax forms each year (2 V 217, 223, 245, 247). A dice-man who was employed "off and on," mainly on weekends, testified that he was paid in cash and that he received no W2 tax forms (2 V 164, 170).

1. Petitioners' main contention here is that the Kentucky co-defendants, Sights and West, were patrons of the enterprise, who at most may have volunteered help from time to time. The argument is aimed at bringing the petitioners' case within the rule of *Rewis* v. *United States*, 401 U.S. 808, that gambling operators do not violate 18 U.S.C. 1952 by the coincidental fact that some of their patrons cross state lines. However, the record shows that Sights and West were employees of the petitioners and that petitioners were within the settled line of cases "correctly appl[ying] § 1952 to those individuals whose agents or employees cross state lines in fur-

therance of illegal activity * * *." *Rewis* v. *United States*, *supra*, at 813.

In denying motions to dismiss at the end of the government's case, the court, citing the testimony of the federal agents and admitted employees of the enterprise set forth above, concluded: "frankly, I don't think there is a shadow of doubt * * * that they were employees" (2 V 373). Certain arguably conflicting or contradictory testimony on this question, relied on by petitioners (Pet. 10-13), appears to have arisen as a result of efforts by defense counsel on cross-examination to show that the co-defendants were not paid employees. However, the jurors were well aware of the relationship of those witnesses—players and employees—to the various defendants and thus could resolve any conflict.

2. Petitioners' second contention is that the evidence was insufficient to show that they had knowledge of the interstate travel of co-defendants Sights and West and that the trial court improperly refused to charge that such knowledge was an element of the offense. As the opinion below notes, the instructions "clearly required the jury to find that appellants had knowledge of their 'co-defendants' interstate travel" (Pet. App. 6a). Moreover, the court below properly ruled that the jury could reasonably infer such knowledge from the co-defendants' long-time employment in the enterprise, their long-term residence in Kentucky, and the fact that they regularly commuted to work in cars bearing Kentucky license plates. In any event, the instruction that

knowledge of their co-defendants' interstate travel was required unnecessarily favored petitioners. As one court of appeals has held (in our view correctly), such knowledge is not an element of the substantive offenses under 18 U.S.C. 1952. *United States* v. *Roselli*, 432 F. 2d 879, 891 (C.A. 9), certiorari denied, 401 U.S. 924.

3. Petitioners' remaining contentions as to the constitutionality of 18 U.S.C. 1952 and the validity of the search are without merit. The statute has been repeatedly upheld. *United States* v. *Lookretis*, 422 F. 2d 647 (C.A. 7), certiorari denied, 398 U.S. 904; *United States* v. *Barnes*, 383 F. 2d 287 (C.A. 6), certiorari denied, 389 U.S. 1040; *United States* v. *Barrow*, 363 F. 2d 62 (C.A. 3), certiorari denied, 385 U.S. 1001; *United States* v. *Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915. The issue of the validity of the search in this case was thoroughly canvassed by the court below on whose opinion we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-196

CHARLES W. LEE, JR. and RAY METCALF, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

The Government concedes in its opposition to the petition that unless the record establishes beyond a reasonable doubt *that Sights and West were clearly employees of petitioners,* then there is *no basis what-*

soever for petitioners' conviction under 18 U.S.C. § 1952 (*Rewis* v. *United States,* 401 U.S. 808).[1]

But, we respectfully submit the Government's memorandum itself simultaneously demonstrates that the record in this case *does not* contain any such proof and that, in truth and in fact, *the Government completely failed to establish any criminally sustainable employment relationship between petitioners and Sights and West at the trial.* In this regard, we point to the following:

1. At page 4 of its opposition, the Government states that the record shows petitioners, *or one of them, always paid their employees "by check on a weekly basis",* with only one exception, a diceman who worked on some weekends "off and on", and who was paid in cash. *But, there are no checks or bank records or any other evidence, oral or written,* to show that petitioners ever paid Sights and West anything—*either by check or in cash.*

2. At page 4 of its opposition, the Government states that petitioners furnished *all* of their employees *"W-2 tax forms each year",* with the exception of the one employee mentioned above, who only worked part time on some weekends for cash. *But, there are no "W-2 tax forms" in the record for either Sights or West and there is not a scintilla of evidence even to suggest that Sights and West received any compensation, taxable or otherwise, from petitioners or either of them.*

3. At page 4 of its opposition, the Government concedes that petitioners were *not* the sole owners and operators of the gambling enterprise here

[1] Indeed, in its Bill of Particulars in this case, the Government unqualifiedly undertook to prove that "Defendants Metcalf and Lee *employed* defendants Sights and West" (R. 125, 126).

involved—rather it admits that two others, Hollingsworth and Simpkins, conducted a gambling enterprise of their own in the same premises and that they (Hollingsworth and Simpkins) retained ⅔ of the profits of that operation. *Hollingsworth and Simpkins were never indicted by the Government, so there is nothing in the record before the Court to indicate what relationship they may have had with Sights and West or to what extent they were responsible for Sights' and West's actions when they were observed by federal agents and other gambling patrons on the premises.*

4. At page 3 of its opposition, the Government admits that prior to petitioners' arrest, "agents had conducted *extensive surveillance* of the gambling room and . . . of Sights and West", who, the Government states, were "*suspected employees of the enterprise*". But, with all of that "*extensive surveillance*", the Government was unable to produce a single piece of paper or a single word of testimony to suggest that Sights and West were "*actual employees*" of petitioners or either of them, or that petitioners ever compensated Sights or West or either of them for any alleged employment services.

Thus, after all of the said "surveillance" and after the trial itself, the Government's case ended where it started—with a record which showed Sights and West to be at the very best "*two suspected employees*", *not* in any respect "*proved employees*" of the petitioners. Indeed, as demonstrated in the petition for certiorari, the record really establishes that Sights and West frequented petitioners' establishment and other gambling places in Indiana as customers or patrons, not as employees.

Clearly, therefore, any fair application of the reasoning of this Court's opinion in *Rewis* v. *United*

States, supra, requires that certiorari be granted in this instance and that petitioners' convictions be set aside.

In any event, it is perfectly clear from the Government's opposition, that the convictions in this case are based not on one, but *on two successive inferences* or *presumptions* only. There was *no actual proof* of any employment relationship between petitioners and Sights and West, *so the jury was permitted to infer or to presume that such a relationship existed (Government's Opposition,* pg. 5); and having made that presumption, *the jury was then permitted to use it as a foundation for a second inference, to wit, that, as presumed employers; petitioners must also be presumed to have knowledge of their presumed employees' interstate travel* (Government's Opposition, pg. 5).

Again, therefore, we urge the Court to review this case and to strike down as unconstitutional these very oppressive felony convictions obtained by the Government without any real proof of any kind, and solely on the basis of a succession of arbitrary and irrational inferences and presumptions (*Leary* v. *United States,* 395 U.S. 6 (1969); *Turner* v. *United States,* 396 U.S. 398 (1970); *United States* v. *Barnes,* CCA, 6, 1967, 383 F.2d 287, 291; *Twitchell* v. *United States,* CCA 9, 1963, 313 F.2d 425).

CONCLUSION

On the basis of the record before this Court, certiorari should be granted to review the extent to which the Interstate Travel Act is being perverted by the Government to obtain unconstitutional convictions in unconsequential, local gambling cases which have no

suggested relationship of any kind to organized, interstate crime—such convictions being exclusively the result of pyramided inferences and presumptions rather than sustainable evidence.

Respectfully submitted,

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